

## Summary of FCC Ex Parte Rules Governing Congressional Communications

The Commission has rules in place to ensure transparency and fairness in our proceedings. The rules include procedures covering some Congressional communications with the agency. In some types of proceedings, Congressional communication must be placed in the agency's official record or served on the parties who are participating in the relevant proceeding. Below we describe our rules governing "ex parte" communications and the procedures for Congressional communications.

### **I. What is an ex parte presentation?**

Under FCC rules, an ex parte presentation is any communication (oral or written) that concerns the merits or outcome of a pending Commission proceeding or any issue in such a proceeding and (1) if written, is not served on the parties or (2) if oral, is made without an opportunity for the parties to be present. For example, if A has filed a complaint at the FCC against B, a letter from C to an FCC Commissioner in support of A's position would be an ex parte communication unless served on A, B, and any other party to the complaint proceeding. A private meeting between C and the Commissioner concerning the merits of A's complaint would be an ex parte communication as well.

**Constituent correspondence.** Consistent with the general rule, a letter to the Commission from a Member of Congress that concerns the merits or outcome of a proceeding, and is not served on the parties to the proceeding, is an ex parte presentation. Likewise, a communication to the Commission from a Member of Congress that attaches or forwards constituent correspondence concerning the merits of a proceeding, and that is not served on the parties to the proceeding, is an ex parte presentation, even if the Member's

cover letter forwarding the constituent correspondence to the Commission does not itself express a view on the merits or outcome of the proceeding. That is because the Member's letter has presented the views of his or her constituent to the Commission.

**Status inquiries.** A letter or call from a Member of Congress or staff that is only a status inquiry (and has no attachments or content addressing the merits) is **not** an ex parte presentation. A status inquiry can express general concern that a proceeding be resolved quickly or deliberately, without being an ex parte presentation. However, such an inquiry will be considered an ex parte presentation if it: (1) becomes more specific and expresses a view as to a particular date by which the proceeding should be resolved or gives reasons other than administrative delay as to why the proceeding should be resolved expeditiously, and (2) is not served on the parties.

Examples:

- Member X writes to the Commission about a pending application. The Member asks to be informed of the status of the application and expresses concern that the application has been pending for an excessive period of time. The Member's letter is a status inquiry and not a presentation.
- The Member requests that the application be acted on by the end of the year or states that expeditious action is needed because the applicant has business arrangements that require prompt action. The Member's letter is an ex parte presentation (unless it is served on the parties).
- The Member asks about the status of the application and attaches a "fact sheet" directed to the Member and prepared by the applicant. The "fact sheet" argues that the Commission should grant the application. The Member's letter and the attachment are an ex parte presentation (unless they are served on the parties).

## **II. When are ex parte presentations permitted and not permitted?**

The FCC's limitations on ex parte presentations by federal legislators generally apply only in adjudicatory-type proceedings and are based on provisions of the Administrative Procedure Act and court decisions concerning due process rights. In such proceedings, known as "restricted proceedings," written presentations to the Commission should be served on the parties and oral communications should not be made unless the parties are invited to be present. If the Commission receives a written ex parte presentation in a restricted proceeding from a Member of Congress that was not served on the parties as required by the ex parte rules, Commission staff will make it part of the record and will serve the parties to the proceeding so they have an opportunity to respond. In the case of an oral presentation in a restricted proceeding that was made outside the rules, Commission staff will prepare a summary, place it in the record, and notify the parties. In cases where an improper ex parte presentation from the Member of Congress was solicited by an interested party, the Commission may impose sanctions on the party that solicited the presentation.

### Examples:

- Member X writes to the Media Bureau addressing issues concerning a pending radio license application. The application has been opposed at the Commission in a petition to deny, but the Member does not serve the letter on the opponent petitioner. The letter will be placed in the record and Commission staff will serve the letter on the applicant and the petitioner.
- If the Member discusses the merits of the application with FCC staff without prior notice to the parties and an opportunity for them to participate, the FCC staff must prepare a memorandum summarizing the call, which will be placed in the record and the parties so notified.

**Adjudicatory proceedings.** The specific types of proceedings in which ex parte communications generally are not permitted include radio and television licensing and

other application proceedings, license transfer proceedings, broadcast allotment proceedings, waiver proceedings, complaint proceedings and enforcement proceedings against particular parties. On occasion, the Commission may determine that adjudicatory proceedings should be subject to the more relaxed ex parte procedures described below for rulemaking proceedings. You should check with the Commission to determine the “ex parte status” of any particular proceeding that is of interest. (Telephone numbers of FCC contacts are provided below.)

### **III. What ex parte procedures apply in general rulemakings?**

Congressional communications concerning the merits of rulemaking proceedings of general applicability are permissible; the communications need not be served on the parties and oral communications may also be made. However, if the presentations are of substantial significance and are clearly intended to affect the ultimate outcome, the FCC staff must place written communications, or a summary of oral communications, in the public record.

#### Examples:

- Member X writes to the Chairman or another Commissioner about a pending rulemaking. The Member expresses the view that the proposed rule would be beneficial and consistent with Congress’s intent. The staff will place the letter in the record of the rulemaking.
- Member X calls the Chairman and orally states the same views. The staff will place a memorandum summarizing the contents of the call in the record.

### **IV. Does the FCC's “Sunshine Rule” apply to Congress?**

During the week before one of the Commission's monthly public business meetings (known as "open meetings," the Commission's "Sunshine Rule" prohibits all contacts with the Commission concerning the matters to be decided at the meeting, until the text of the Commission's decision is publicly released. Congress is **not** subject to the FCC's Sunshine Rule.

However, during the Sunshine period, Congress is still subject to the requirements of the ex parte rules applicable to the underlying proceeding. Thus, as described above, ex parte presentations in restricted proceedings are not permitted. In a general rulemaking, the Commission will disclose the ex parte contact under its normal procedures. For example, as discussed above, if the Congressional contacts are of substantial significance and are clearly intended to affect the ultimate outcome of the rulemaking, the FCC staff must place written communications (and a summary of oral communications) in the public record.

Example:

- Two days before an open meeting at which the Commission is scheduled to consider a Report and Order, Member X calls an FCC Commissioner to urge inclusion of a provision favored by the Member. The staff will place a memorandum summarizing the phone call in the record of the rulemaking.

**V. Whom can I call for assistance?**

For more information about these procedures in general or with regard to a specific proceeding, please call the FCC's Office of General Counsel at (202) 418-1720 or the FCC's Office of Legislative Affairs at (202) 418-1900.